Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

GREGORY J. COVUCCI,
Petitioner,

v.

SERVICE MERCHANDISE COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, construing evidence most favorably to Petitioner, an employer wrongfully terminated an employee for taking leave in excess of what is granted under the FMLA where it is uncontested that the employer designated the employee's leave of absence as Worker's Compensation leave and designated none of the employee's leave as FMLA leave.

2. Whether the lower Court decisions should be reversed in accordance with this Court's ruling in Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 152 L.Ed.2d 167, 122 S.Ct. 1155 (2002), which decision was issued subsequent to the rulings in this case.

PARTIES TO THE PROCEEDING

Gregory C. Covucci, Petitioner and Plaintiff-Appellant below, is an individual resident of the City of Toledo, County of Lucas, State of Ohio and was formerly employed by Respondent.

Service Merchandise Company, Inc., Respondent and Defendant-Appellee below, is a retail establishment serving the general public. Respondent at all times material hereto has been engaged in an industry affecting commerce and maintained a store (since closed) located in Lucas County, Ohio, where Petitioner was employed. There are no parent companies and no subsidiary corporations of Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

In its order filed on March 5, 1999, the United States Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing. The Petition for Rehearing was submitted to the original panel. This order is unpublished and is attached as Appendix A. The original judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 8, 1999. This decision was not recommended for full text publication by the Sixth Circuit and is published at 178 F.3d 1294 (6th Cir. 1999). This decision is attached hereto as Appendix B. The Order of the Northern District of Ohio, Western Division (per Judge James G. Carr) granting Respondent's Motion for Summary Judgment in all respects was entered November 13, 1997 and is unpublished. See Appendix C. This Order was accompanied by a Judgment Entry also entered by the District Court on November 26, 1997. The Judgment Entry is also unpublished and is attached hereto as Appendix D.

STATEMENT OF JURISDICTION

The jurisdictional basis for federal jurisdiction in the Court of first instance was pursuant to 28 U.S.C. §§ 1331, 1337, 1343, 2201 and 2202. Moreover, supplemental claims under Ohio statutory and common law were included in the Complaint but were dismissed without prejudice by the District Court. Said State claims were later brought before State Court and removed to the U.S. District Court. Judge

Carr entered judgment in favor of Respondent with respect to the State claims. The State claims are not at issue at the present time. The jurisdictional basis of the State law claims was the District Court's supplemental jurisdiction under 28 U.S.C. §1367. Petitioner invokes the jurisdiction of the United States Court of Appeals for the Sixth Circuit pursuant to 29 U.S.C. Section 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Statute involved, 29 U.S.C. §2601, et seq., is set forth in Appendix E.

STATEMENT OF THE CASE

Statement of Facts

Petitioner was employed by Respondent in November of 1990 and was working as an assistant manager for Respondent on February 6, 1994 when he was injured on the job. Petitioner's last day of work after the injury was February 25, 1994. Respondent placed Petitioner on an official leave of absence commencing on March 5, 1994. It is uncontested that Petitioner's leave of absence beginning on March 5, 1994 was specifically designated as Worker's Compensation leave and was not coded as FMLA leave at any time.

Petitioner received authorized absences from work from his treating physician from February 25, 1994 through October of 1994. During this period, Petitioner requested that Respondent place him on "light duty" work, but Respondent refused to do so. Respondent instead demanded that Petitioner to return to work without restriction.

Petitioner attended physical therapy from October of 1994 through December of 1994. On January 17, 1995, Petitioner claims that his physician extended his leave for one additional year. The record contains no writing evidencing the extended leave, and Respondent denies receiving any notification of such.

Respondent claims that on January 30, 1995, it issued to Petitioner, via certified U.S. mail, a letter stating that Petitioner would be terminated by February 3, 1995 or within three days of receipt of said letter if he did not provide Respondent with medical documentation that he was unable to work. Petitioner denies receiving the certified letter. Said letter was returned to Respondent by the Post Office on February 16, 1995.

It is uncontested that Respondent failed to designate any portion of Respondent's 12-month leave as FMLA leave as it was required to do. 29 C.F.R. § 825.208(a)(2) & (b) (1994) (interim regulation).

Petitioner was terminated on February 28, 1995. He was on leave from February 25, 1994 to February 28, 1995, the date of his termination.

Description of Proceedings Below

The District Court disposed of this case on the employer's Motion for Summary Judgment. The District Court found that Petitioner's ADA claims were time-barred (this issue is not brought before this Honorable Court); that Petitioner failed to provide medical certification indicating the need for continued absence; and that Petitioner received in excess of 12 months of FMLA leave. The District Court's Order was filed

November 13, 1997 and the Judgment Entry filed on November 26, 1997.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. There, he presented three basic arguments. First, Petitioner contended that the 90-day period in which he was required to file suit under the ADA should have been equitably tolled. Secondly, Petitioner contended that an employer cannot count a leave of absence as FMLA leave without officially designating the leave as such, pursuant to the employer's requirements under the FMLA regulations. Petitioner also contended that he had provided sufficient medical certification for his medically related leave and that his employer was on notice of his continuing need for such leave.

In an Opinion filed on February 8, 1999, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court (Appendix B). The Sixth Circuit's Opinion noted that the District Court had correctly found that Petitioner was not entitled to equitable tolling of the 90-day period to file his ADA claims. This issue is not now before this Honorable Court. The Court also agreed with the District Court that Petitioner had failed to provide medical certification for his FMLA leave. Finally, the Sixth Circuit found that, though Respondent had failed to designate any portion of Petitioner's leave as FMLA leave as required by FMLA regulations, to hold for Petitioner would have been an egregious elevation of form over substance. The Court ruled that Petitioner received in excess of 12 months of leave and that his termination was justified, despite the employer's failure to designate said leave as FMLA leave, pursuant to applicable FMLA regulations.

On February 20, 1999, Petitioner timely filed a Petition for Rehearing. In an order filed March 5, 1999, the Sixth Circuit denied the Petition for Rehearing. See Appendix A.

On March 23, 1999, Respondent filed bankruptcy in the U.S. Bankruptcy Court for the Middle District of Tennessee, Nashville, Tennessee. Respondent listed Petitioner's litigation claims, including his rights of appeal, as claims in said bankruptcy. On June 14, 2004, the Bankruptcy Court issued an Order lifting the automatic stay as it related to Petitioner's claims. See Appendix F. On June 22, 2004, Petitioner filed a Notice of Modification of Confirmation Order by Bankruptcy Court as to Allow Appeal in this Action to Continue in the U.S. Court of Appeals for the Sixth Circuit. 11 U.S.C. § 108(c) allows for civil actions against bankruptcy debtors to be continued against the debtors within 30 days of the lifting of the automatic stay. See Appendix G. Petitioner timely files this Petition.

This case presents the following question for review. Petitioner contends that Respondent wrongfully terminated Petitioner for taking leave in excess of what is granted under the FMLA where it is uncontested that Respondent had designated the Petitioner's leave as Worker's Compensation leave and designated none of Petitioner's leave as FMLA leave. Petitioner also contends that the lower Court rulings should be reversed in accordance with this Court's decision in Ragsdale v. Wolverine World Wide, Inc. 535 U.S. 81, 152 L.Ed.2d 167, 122 S.Ct. 1155 (2002), which decision was issued subsequent to the rulings in this case.

ARGUMENT

Petitioner, as noted, supra, contends that Respondent wrongfully terminated Petitioner for taking leave in excess of what is granted under the FMLA where it is uncontested that Respondent had designated the Petitioner's leave as Worker's Compensation leave and designated none of Petitioner's leave as FMLA leave. Petitioner also contends that the lower Court rulings should be reversed in accordance with this Court's decision in Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 152 L.Ed.2d 167, 122 S.Ct. 1155 (2002), which decision was issued subsequent to the rulings in this case. In the alternative, Petitioner requests a remand to the lower Courts for a finding of fact in accordance with the Ragsdale decision.

The U.S. Court of Appeals for the Sixth Circuit found that Respondent had failed to designate any portion of Petitioner's leave as FMLA leave as it was required to do under 29 C.F.R. § 825.208(a)(2) & (b) (1994) (interim regulation). Said regulations read as follows: "In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, based on information provided by the employee." 29 C.F.R. § 825.208(a)(2) (1994) (interim regulation). "The employer must immediately notify the employee that the paid leave is designated...and it will be counted as FMLA leave." 29 C.F.R. § 825.208(b) (1994) (interim regulation). These interim regulations placed a duty on an employer to designate FMLA-qualifying leave as such and to notify the employee of that designation.

Subsequent to the ripening of the instant case, the Secretary of Labor promulgated a regulation that reads as follows: "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the

leave taken does not count against an employee's FMLA entitlement." 29 C.F.R. § 825.700(a). This Court, in Ragsdale v. Wolverine World Wide, Inc. 535 U.S. 81, 152 L.Ed.2d 167, 122 S.Ct. 1155 (2002), found that 29 C.F.R. § 825.700(a) was beyond the Secretary's authority and contrary to the FMLA because the regulation "relieved employees of the burden of proving any real impairment of their rights and resulting prejudice." Ragsdale, 535 U.S. at 90. In Ragsdale, the employee, in fact, enjoyed 30 weeks of FMLA leave though the employer failed to designated any those 30 weeks as FMLA leave. The employee was terminated and later sued under 29 C.F.R. § 825.700(a), attempting to claim an additional 12 weeks of FMLA leave. This Court held for the employer, finding that the employee was not prejudiced as she would not have taken less leave or intermittent leave had she received notice of the required designation. Accordingly, the employee's FMLA claims were denied.

Ragsdale has since been distinguished by lower Courts. Subsequent decisions have pointed out that Ragsdale requires Courts to "make a fact-specific inquiry into the damage that an employee suffered because he or she did not receive an FMLA designation notice." Stansberry v. Uhlich Children's Home, 264 F.Supp.2d 681, 689 (N.D. Ill. 2003). See also Donahoo v. Master Data Center, 282 F.Supp.2d 540, 555 (E.D. Mich. 2003).

Furthermore, the Ragsdale decision "does not prevent an employee from attempting to prove he was prejudiced by his employer's failure to provide timely notice." Sims v. Schultz, 305 F.Supp.2d 838, 845 (N.D. Ill. 2004). In Sims, the Court denied an employer's motion to dismiss where the employer designated the employee's leave of absence as sick leave but did not designate the leave as FMLA leave. The employee's leave of absence lasted in excess of 12 weeks. The employer

terminated the employee under FMLA guidelines limiting FMLA leave to 12 weeks in a 12-month period. The employer argued that Ragsdale allowed it to retroactively designate the employee's sick leave as FMLA leave. The Court disagreed and denied the employer's motion to dismiss. Similarly, in the instant case, the Respondent designated Petitioner's leave as Worker's Compensation leave but did not designate any portion of Petitioner's leave as FMLA leave. At the time of termination, Respondent attempted to retroactively designate Petitioner's leave as FMLA leave and terminate him under FMLA limitations. Petitioner was never afforded his rights under the FMLA and was obviously prejudiced through his termination. Accordingly, the lower Courts' decisions should be reversed.

Ragsdale has also been distinguished in cases where the employees did not enjoy the protections of FMLA leave prior to termination. See Ruder v. Maine General Medical Center, 204 F.Supp.2d 16, 19 (Dist. Ct. Maine, 2002). In Ruder, the employer placed the plaintiff-employee on medical leave but denied FMLA leave. Though the issue in Ruder focused on the first-year employee's "eligibility" under the FMLA, the Ruder Court expressly distinguished Ragsdale by stating that, in Ragsdale, "the employee enjoyed the protections of the FMLA throughout an initial period of leave but nevertheless insisted that those weeks should not be counted against her total FMLA allotment." Ruder, 204 F.Supp.2d at 19. The Ruder Court denied the employer's motion to dismiss. Similarly, the instant case involves an employee who was not afforded FMLA protections during his leave of absence. Rather, Respondent specifically designated Petitioner's initial leave of absence as Worker's Compensation leave. No portion of Petitioner's leave was designated as FMLA leave. See Stansberry v. Uhlich Children's Home, 264 F.Supp.2d 681, 689 (N.D. Ill. 2003) (Court denied an employer's motion to

dismiss on the bases that "it is not clear...whether [the employer] designated any part of [the employee's] previous absences as FMLA leave or provided him with a notice of that designation"). The instant case is distinguishable from a situation where, as in Ragsdale, the employee was, in fact, enjoying the full protections of the FMLA prior to termination and merely attempting to prolong the FMLA leave period by means of an employer's technical violation of FMLA regulations.

Wherefore, Petitioner requests that this Court grant Certiorari to reverse the lower Court decisions, or in the alternative, to remand the matter for a finding of fact in accordance with this Court's Ragsdale decision.

CONCLUSION

For reasons set forth in this Petition for Writ of Certiorari, Petitioner Covucci respectfully requests that a writ issue as prayed for in order to review the aforedescribed Sixth Circuit Opinion set forth in Appendix.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 97-4472

[Filed March 5, 1999]

GREGORY J. COVUCCI,
Plaintiff-Appellant

v.

SERVICE MERCHANDISE COMPANY, INC.,
Defendant-Appellee

Before: JONES and COLE, Circuit Judges; DLOTT,* District Judge.

* The Honorable Susan J. Dlott, United States District Judge for the Southern District of Ohio, sitting by designation.

ORDER

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 97-4472

[Filed February 8, 1999]

GREGORY J. COVUCCI,
Plaintiff-Appellant

v.

SERVICE MERCHANDISE COMPANY, INC.,
Defendant-Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
96-07720-
Carr. 12-1-97

Before: JONES and COLE, Circuit Judges; DLOTT,* District Judge.

* The Honorable Susan J. Dlott, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

SUSAN J. DLOTT, District Judge. Plaintiff-Appellant James Covucci brought suit against his former employer. Defendant-Appellee Service Merchandise Co., Inc. raising claims under the Americans with Disabilities Act ("ADA"), Ohio state law, and the Family and Medical Leave Act ("FMLA"). The District Court granted Summary Judgment for Service Merchandise on all counts. Specifically, the District Court held that (1) the ADA claim was time-barred for failure to commence suit within ninety days of the Court's decision denying appointment of counsel, (2) the Court lacked jurisdiction over the state law claims, and (3) the FMLA claim failed because Covucci did not provide medical certification and because Covucci received more than twelve weeks of leave in a twelve month period. Covucci now appeals the District Court's ruling on the ADA and FMLA issues,[1] For the reasons that follow, the decision of the District Court is **AFFIRMED.**

I.

Covucci, then an assistant manager at the Service Merchandise store in Toledo, Ohio, was injured at work in February 1994. Covucci's last day of work following the accident was February 25, 1994. Service Merchandise placed Covucci on a leave of absence officially beginning March 5.

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[1] Plaintiff was originally appealing the state law claim as well, however that issue is now moot. Subsequent to the District Court's November 13, 1997 Order, Plaintiff filed his state law claims in state court. Service Merchandise then removed the action to federal court, the Northern District of Ohio. The action is currently pending again before Judge Carr in the United States District Court, Northern District of Ohio.

The leave of absence was specifically coded as a worker's compensation leave and was not coded as a FMLA leave at any time.

Covucci sought medical attention for his injuries on February 25, 1994 with Mark Fine, M.D. Dr. Fine executed a series of work excuses beginning in February 1994, continuing to authorize Covucci's absence from work until the end of October 1994. Dr. Fine refused to authorize Covucci's absence beyond that time stating that he was non-compliant with treatment and should seek medical care elsewhere. Covucci also had his injuries examined by Gregory Thomas, M.D., on July 28, 1994. Dr. Thomas concluded that there was no injury and that Covucci's pain complaints were "markedly exaggerated." Covucci claims that during his excused absence he requested by telephone to return to work on a "light duty" basis. Service Merchandise did not think Covucci should return to work so long as his work excuses stated he was unable to work at all.

After concluding treatment with Dr. Fine, Covucci attended regular physical therapy sessions from October 19, 1994 through December 1, 1994 and was examined by Gordon Mather, M.D. on January 17, 1994. Covucci claims that Dr. Mather extended his leave for one year and that he attempted to notify Service Merchandise of the extension. The record does not contain the extension and Service Merchandise managers deny receiving it.

Covucci did not provide Service Merchandise with medical authorization for his absence from work from October 1994 to his termination in February 1995. On January 30, 1995 Service Merchandise sent Covucci a certified letter stating that he would be terminated by February 3, 1995 or within three days of receipt of the letter

if he did not provide the company with medical documentation that he was unable to work. Covucci denies receiving the certified letter and the certified mail receipt shows the letter was returned on February 16. Covucci admits that he knew the Service Merchandise policy required a doctor's authorization to be off work for more than three days and that a person off work for more than one year was terminated whether or not the absence was medically authorized.

Covucci was terminated on February 28, 1995. Covucci subsequently filed discrimination charges with the Equal Employment Opportunity Commission ("EEOC") and was issued a right to sue letter on February 6, 1996. On May 6, 1996, just within the ninety day period to file a complaint, Covucci filed an Application for Appointment of Counsel and Authorization to Commence Suit Without the Prepayment of Costs, Fees or Security with the District Court for the Northern District of Ohio. Magistrate Judge Armstrong issued an Order on July 15, 1996 denying the appointment of counsel but granting Covucci's application to file without the prepayment of costs, fees or security. Covucci, however, did not file his Complaint until November 22, 1996. The District Court granted Summary Judgment a year later and this appeal followed.

II.

Plaintiff-Appellant raises the following issues for appeal: (1) whether the District Court erred in holding that the ADA claim was time-barred for Covucci's failure to file his complaint within ninety days after the Magistrate Judge's decision denying appointment of counsel; and (2) whether the District Court erred in granting summary judgment for Service Merchandise on the FMLA claim finding that

Covucci failed to meet the procedural requirements of the FMLA, or alternatively, finding that Covucci received all of the benefits entitled him under the FMLA?

III.

A. The ADA Claim

The District Court dismissed the ADA claim because it was time-barred. Covucci argues on appeal that the filing deadline should have been equitably tolled. This Court must review the District Court's decision regarding equitable tolling for an abuse of discretion. See *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998). The procedures for filing a complaint under the ADA are the same as those for filing under Title VII and a potential plaintiff has ninety days to file a complaint after receipt of the EEOC right to sue letter. See 42 U.S.C. § 12117; 42 U.S.C. § 2000e-5(f)(1). However, this limitations period is not "a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) (referring to the filing of a timely charge with the EEOC); *Truitt*, 148 F.3d at 646 (recognizing that the logic of Zipes applies to filing suit after receipt of the EEOC right to sue letter).

Limitations periods are equitably tolled in the Sixth Circuit during the pendency of motions to file *in forma pauperis* and for the appointment of counsel. See *Truitt*, 148 F.3d at 647-48 (*in forma pauperis*); *Harris v. Walgreen's Distribution Center*, 456 F.2d 588, 592 (6th Cir. 1972) (motion for counsel). After issuing a decision on the motion, the District Court should give the potential plaintiff the

remainder of the limitations period to file the complaint. If the remainder is unreasonably short, the District Court should set a reasonable time for filing. See *Truitt*, 148 F.3d at 648; Harris, 456 F.2d at 592.

In this case, Covucci filed his Application at the end of the ninety day period for filing a complaint after receipt of the right to sue letter. Although the Magistrate Judge in his July 15, 1996 Order should have expressly set a reasonable time for Covucci to file his complaint, in no event would the reasonable time set have exceeded an additional ninety days, the length of the original limitations period. Covucci did not file his Complaint for more than ninety days after the Magistrate Judge's July 15, 1996 decision.

Covucci argues that the limitations period should be equitably tolled because the Magistrate Judge's order gave no time limit for filing a complaint and because he allegedly was told by a person in the Magistrate Judge's office to keep them appraised of his attempts to find counsel. Importantly, Covucci admits that he knew the EEOC letter gave him ninety days to file a complaint and that is why he filed the timely Application on May 6, 1996.

The Sixth Circuit has identified five factors to consider in determining the appropriateness of tolling a limitations period:

> (1) lack of actual notice . . . ; (2) lack of constructive knowledge. . . ; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) plaintiff's reasonableness in remaining ignorant of the notice requirement.

E.E.O.C. v. Kentucky State Police Dep't, 80 F.3d 1086, 1094 (6th Cir. 1996). As to the first, second, and fifth factors,

Covucci admits he knew of the ninety day limitation to file suit. He argues, though, that he understood his communications with the Magistrate Judge's office to mean that so long as he was seeking an attorney and he kept the Court appraised of his efforts regarding the same, he did not have to file. The Court does not accept this argument. It is true that a defendant's misstatements to a potential plaintiff regarding the law may justify tolling. See *Jackson v. Richards Medical*, 961 F.2d 575, 579 (6th Cir. 1992) (citation omitted). However, to allow equitable tolling based on an ambiguous communication allegedly made by an unidentified court employee would render the statutory filing deadline meaningless.

As to the third factor, Covucci argues he was diligent in pursuing his rights and that the filing delay was due to his inability to secure legal counsel. This argument is similarly unavailing. The Court finds it difficult to believe that it would require four months of diligent searching to find an attorney in a metropolitan area as large as Toledo. Finally, as to the fourth factor, Service Merchandise was arguably prejudiced by the delay because Covucci waited for more than eight months to file suit after receiving the right to sue letter.

Therefore, it was not an abuse of discretion to refuse to equitably toll the filing deadline and the District Court's decision to bar the ADA claim is affirmed.

B. The FMLA Claim

This Court of Appeals reviews de novo the District Court's grant of summary judgment. See *Hartsel v. Keys, 87 F.3d 795, 799 (6th Cir. 1996)*. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P 56(c). The Court must consider the evidence, together with all inferences that can permissibly be drawn therefrom, in the light most favorable to the party opposing the motion. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

The District Court granted Summary Judgment as to this claim on two grounds. First, the Court held that Covucci did not provide the medical certification needed for a continued absence. Second, the Court found that Service Merchandise provided Covucci with more than the twelve weeks leave mandated by the FMLA. Covucci appeals the decision arguing that he clearly qualified for FMLA leave and that under the regulations issued pursuant to the FMLA an employer cannot count a leave of absence as an FMLA leave without officially designating the leave as such. Because the Court finds that Covucci received more than all rights to which he was entitled under the FMLA, there is no need to discuss whether or not Covucci provided proper medical certification for an FMLA leave.

The FMLA was enacted to "balance the demands of the workplace with the needs of families, . . . to entitle employees to take reasonable leave for medical reasons . . . in a way that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b). It provides that, subject to the medical certification requirement, "an eligible employee shall be entitled to a total of twelve workweeks of leave during any twelve-month period . . . (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1). A serious health condition is defined in the

statute as "an illness, injury, impairment, or physical or mental condition that involves–(A) inpatient care in a hospital; hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The statute prohibits employers from interfering with, restraining, or denying an employee's exercise or attempt to exercise his FMLA rights. See 29 U.S.C. § 2615.

In this case, Covucci denies that he received the Service Merchandise certified letter dated January 30, 1994 requesting that he provide medical documentation justifying his absence or be terminated. Although the certified mail asked for medical certification that he was unable to work, it did not mention the FMLA or use the words "serious health condition." According to the interim regulations implementing the FMLA,[2] the employee need only state a qualifying reason for an FMLA leave, he need not expressly mention the FMLA. See 29 C.F.R. § 825.208(a)(1) (1994) (interim regulation). Once an employee has given notice to the employer of the need for leave, the employer must provide the employee with specific notice of the employee's obligations, including the duty to provide medical

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[2] The permanent regulations implementing the FMLA, 29 U.S.C. § 825 *et seq.*, were issued on January 6, 1995, but did not become effective until April 6, 1995 after Covucci's termination from Service Merchandise. See 60 Fed. Reg. 6658 (1995). In the Final Brief of Plaintiff-Appellant, Plaintiff mistakenly argues that sections of the permanent regulations were violated. In the Final Reply Brief, Plaintiff mistakenly asserts that the permanent regulations became effective on February 6, 1996, before Plaintiff was terminated. The interim regulations were in effect during the pendency of Covucci's leave from Service Merchandise. The permanent regulations are similar, but not identical, to the interim regulations.

certification, and the consequences for failing to do so. See 29 C.F.R. § 825.301(c)(2) (1994) (interim regulation). "In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, based on information provided by the employee." 29 C.F.R. § 825.208(a)(2) (1994) (interim regulation). "The employer must immediately notify the employee that the paid leave is designated . ... and it will be counted as FMLA leave." 29 C.F.R. § 825.208(b) (1994) (interim regulation).

The District Court concluded that Service Merchandise allowed Covucci more than the FMLA-mandated leave. The record contains strong evidence that at least before October 30, 1994–the last date Dr. Fine authorized Covucci's absence–Service Merchandise had to know that Covucci was suffering from a potentially serious medical condition that might qualify him for FMLA leave. See 29 C.F.R. § 825.208(a)(1) (1994) (interim regulation) (ruling that employee need only provide the employer with a FMLA-qualifying reason for leave). The work excuses Dr. Fine issued for Covucci gave a diagnosis, stated that he was unable to work, and provided an estimated return to work date. Under the regulations, then, it was Service Merchandise's duty to inform Covucci of his rights and responsibilities under the FMLA. See 29 C.F.R. § 825.301(c)(2) (1994) (interim regulation). The facts suggest that Covucci never received the certified letter asking for medical certification or any specific notice of FMLA rights. Further, it is true that Service Merchandise failed to designate any portion of Covucci's twelve month leave as FMLA leave as it was required to do. 29 C.F.R. § 825.208(a)(2) & (b) (1994) (interim regulation) (ruling that it is the employer's responsibility to designate leave as FMLA leave).

The Court agrees that Service Merchandise may have committed technical violations of the FMLA regulations. Regardless, it would be an egregious elevation of form over substance to allow Covucci an additional twelve weeks of leave specifically coded as FMLA leave. See *Dodgens v. Kent Mfg. Co.*, 955 F. Supp. 560, 564 (D.S.C. 1997) (refusing to allow an employee's claim to go forward despite the employer's failure to follow the notice regulations when the employee received all the leave to which he was entitled under the FMLA). Service Merchandise already granted Covucci twelve months of unpaid leave, including the last three months during which time Covucci did not provide a doctor's excuse from work. Covucci simply was not denied any of the substantive rights promised by the FMLA. Surely, Congress did not intend the FMLA to grant fifteen months of leave to an employee who provided medical excuses for only eight months of leave.

Therefore, on these facts the Court will not elevate procedural regulations over the substantive rights guaranteed employers and employees by the FMLA. The District Court's decision to grant Summary Judgment on the FMLA claim is affirmed.

IV.

For the reasons stated above, the decision of the District Court to grant Summary Judgment to Service Merchandise is **AFFIRMED.**

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

3:96CV7720

[Filed November 13, 1997]

Gregory J. Covucci,	)
Plaintiff,	)
	)
v.	)
	)
Service Merchandise Company, Inc.,	)
Defendant.	)
	)

Order

This is a discrimination case in which plaintiff alleges that Service Merchandise Company, Inc., discriminated against him by terminating his employment. (Doc. 1). This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. Pending is defendant's motion for summary judgment. (Doc. 27). For the following reasons, defendant's motion shall be granted.

Background

On February 25, 1994, plaintiff was absent from work due to an alleged back injury sustained while performing the duties of his employment. Pursuant to company policy, plaintiff provided defendant with an Excuse From Work form indicating that plaintiff could return to work on February 28, 1994. Subsequent forms were provided to defendant which excused plaintiff from work up through October 30, 1994. However, plaintiff did not return to work at this time. On January 30, 1995, defendant sent a letter to plaintiff, via certified mail, requesting documentation concerning the plaintiff's continued absence and providing information to plaintiff regarding his continued employment. Plaintiff never accepted nor responded to this letter. As such, defendant terminated plaintiff's employment effective February 28, 1995.

After his termination, on May 1, 1995, plaintiff flied a complaint with the United States Equal Employment Opportunities Commission and, on February 6, 1996, received a notice of right to sue. Within 90 days of this notice, plaintiff applied for appointment of counsel and authorization to commence suit without prepayment of costs, fees or security. Covucci v. Service Merchandise, Case No. 3:96M7093. On July 15, 1996, plaintiff's request for appointment of counsel was denied and his request to proceed in forma pauperis was granted. On November 22, 1996, plaintiff brought forth this action.

Discussion

Plaintiff initially alleges that defendant's termination of his employment violated the Americans with Disabilities Act, 42 U.S.C. §1210, et seq. (ADA). Defendant responds that this

claim is time-barred due to plaintiff's failure to commence suit within 90 days of the decision denying his request for appointment of counsel. I agree.

A party must bring forth an ADA claim within 90 days of receipt of a right to sue notice. 42 U.S.C. § 2000-e5(f)(1). It is unrefuted that this action was filed after the 90 day period and, while it is recognized that the limitations period is not a jurisdictional prerequisite and, hence, subject to equitable tolling, Zipes v. Trans-World Airline. Inc., 455 U.S. 385, 393 (1982), plaintiff fails to provide any facts which suggest that the principles of equitable tolling are applicable in this case.

Plaintiff does contend that filing for appointment of counsel should toll the limitations period. However, plaintiff's motion for appointment of counsel will only serve to toll the applicable limitations period until the motion is disposed of. Harris v. Walgreen's Distribution Center, 456 F.2d 588, 592 (6th Cir. 1972). Plaintiff's motion was disposed of on July 15, 1996, and this action was not commenced until November 22, 1996. As such, this action was not flied within the 90 day limitations period and, therefore, plaintiff's ADA claim is barred.

Plaintiff also brings forth a claim under the Family Medical Leave Act, 29 U.S.C. § 2601, et seq. (FMLA). Defendant contends that plaintiff received FMLA leave concurrently with his workers' compensation leave and, as such, defendant met the requirements under FMLA. Plaintiff responds that because defendant did not meet the procedural and documentary requirements established under FMLA, defendant failed to provide him with the requisite 12 week leave period provided for under FMLA. Nevertheless, it is

unrefuted that plaintiff was provided with one full year of unpaid leave due to his illness.

Under the FMLA, an employer is required to provide an eligible employee With 12 workweeks of leave during any 12 month period if the employee is unable to perform the functions of his or her job due to a serious medical condition. 29 U.S.C. § 2612(a)(1)(D). This requirement is subject to the employee providing the employer with medical certification upon request. 29 U.S.C. §§ 2612, 2613. The purpose of FMLA is to "allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons." 29 C.F.R. § 825.101 (1997).

Assuming, arguendo, that plaintiff was an eligible employee, plaintiff's allegations are without merit for two reasons. First, plaintiff does not deny that he failed to provide, at defendant's request, a medical certification indicating the need for continued absence. Second, plaintiff received well over 12 weeks of leave in a 12 month period. In fact, Plaintiff received an entire 12 month period of leave. Because Plaintiff received all of the benefits guaranteed under FMLA, allowing plaintiff to succeed on his claim would be promoting form over substance. Dogens v. Kent Manufacturing Co., 955 F.Supp. 560, 565 (D.S.C. 1997). Defendant is not required to keep plaintiff on unpaid leave indefinitely. 29 U.S.C. § 2612. Accordingly, defendant's motion for summary judgment shall be granted with respect to plaintiff's FMLA claim.

Plaintiff also alleges violations of Ohio Rev. Code § 4112.02 and Ohio public policy.[1] Defendant responds that this court does not have jurisdiction over these claims.

Although a federal court may exercise supplemental jurisdiction over state claims if the court has dismissed all claims over which it had original jurisdiction, 28 U.S.C. § 1367(c), the Sixth Circuit Court of Appeals has consistently held that "if the federal claims are dismissed before trial... the state claims should be dismissed as well." Landefield v. Marion General Hosp., Inc., 994 F.2d 1178, 1182 (6th Cir. 1994) citations omitted.

Nonetheless, a federal court may exercise jurisdiction over the state claims after the federal claims have been dismissed if judicial economy or other concerns would weigh towards exercising jurisdiction. Id. However, none of these concerns are present and, as such, plaintiff's state claims are dismissed.

---

[1] Plaintiff contends that this court has jurisdiction of these claims under both supplemental and diversity jurisdiction. However, to sustain a diversity action where a corporation is named as a party, the complaint must plead both the state of incorporation and the principal place of business Averdick v. Republic Financial Services, Inc., 803 F.Supp. 37, 40 (E.D.Ky. 1992). Here, plaintiff has plead neither of these and, as such, cannot sustain a claim of diversity.

For the foregoing reasons, it is hereby

ORDERED THAT defendant's motion for summary judgement shall be, and the same hereby is, granted.

So ordered.

/s/ _____
James G. Carr
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

3:96CV7720

[Filed November 21, 1997]

Gregory J. Covucci,	)
Plaintiff,	)
	)
v.	)
	)
Service Merchandise Company, Inc.,	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendant's motion for summary judgment shall be, and the same hereby is, granted.

Case closed.

/s/ _____
U.S. District Court Judge

November 21, 1997 — Geri M. Smith
Date — Clerk

/s/ _____
(By) Deputy Clerk

APPENDIX E

STATUTORY PROVISIONS INVOLVED

TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE

29 USCS § 2601 (2004)

§ 2601. Findings and purposes

(a) Findings. Congress finds that--

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to

discriminate against employees and applicants for employment who are of that gender.

(b) Purposes. It is the purpose of this Act--

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment [USCS, Constitution, Amendment 14, § 1] minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

HISTORY: (Feb. 5, 1993, P.L. 103-3, Title I, § 2, 107 Stat. 6.)

TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE
GENERAL REQUIREMENTS FOR LEAVE

29 USCS § 2611 (2004)

§ 2611. Definitions

As used in this title [29 USCS §§ 2611 et seq.]:

(1) Commerce. The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act, 1947 (29 U.S.C. 142 (1) and (3)).

(2) Eligible employee.

(A) In general. The term "eligible employee" means an employee who has been employed--

(i) for at least 12 months by the employer with respect to whom leave is requested under section 102 [29 USCS § 2612]; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions. The term "eligible employee" does not include--

(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code [5 USCS §§ 6381 et seq.] (as added by title II of this Act); or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination. For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), *the legal standards established under* section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) shall apply.

(3) Employ; employee; State. The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203 (c), (e), and (g)).

(4) Employer.

(A) In general. The term "employer"--

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes--

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency. For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits. The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such

benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)).

(6) Health care provider. The term "health care provider" means--

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent. The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person. The term "person" has the same meaning given such term in section 3(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(a)).

(9) Reduced leave schedule. The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary. The term "Secretary" means the Secretary of Labor.

(11) Serious health condition. The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves--

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter. The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is--

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse. The term "spouse" means a husband or wife, as the case may be.

HISTORY: (Feb. 5, 1993, P.L. 103-3, Title I, § 101, 107 Stat. 7; Jan. 23, 1995, P.L. 104-1, Title II, Part A, § 202(c)(1)(A), 109 Stat. 9.)

29 USCS § 2612 (2004)

§ 2612. Leave requirement

(a) In general.

(1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement. The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on a reduced leave schedule.

(1) In general. Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee

intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5) [29 USCS § 2613(b)(5)], leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

(2) Alternative position. If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1), that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that--

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted. Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)), the compliance of an employer with this title [29 USCS §§ 2611 et seq.] by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave.

(1) Unpaid leave. If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under

this title [29 USCS §§ 2611 et seq.] may be provided without compensation.

(2) Substitution of paid leave.

(A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title [29 USCS §§ 2611 et seq.] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave.

(1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee--

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by the same employer. In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken--

(1) under subparagraph (A) or (B) of subsection (a)(1); or

(2) to care for a sick parent under subparagraph (C) of such subsection.

HISTORY: (Feb. 5, 1993, P.L. 103-3, Title I, § 102, 107 Stat. 9.)

29 USCS § 2613 (2004)

§ 2613. Certification

(a) In general. An employer may require that a request for leave under subparagraph (C) or (D) of section 102(a)(1) [29 USCS § 2612(a)] be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate.

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification. Certification provided under subsection (a) shall be sufficient if it states--

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4) (A) for purposes of leave under section 102(a)(1)(C) [29 USCS § 2612(a)(1)(C)], a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)], a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)], a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 102(a)(1)(C) [29 USCS § 2612(a)(1)(C)], a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their

recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion.

(1) In general. In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 102(a)(1) [29 USCS § 2612(a)(1)(C) or (D)], the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) for such leave.

(2) Limitation. A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions.

(1) In general. In any case in which the second opinion described in subsection (c) differs from the opinion in the original certification provided under subsection (a), the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b).

(2) Finality. The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification. The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

HISTORY: (Feb. 5, 1993, P.L. 103-3, Title I, § 103, 107 Stat. 11.)

29 USCS § 2614 (2004)

§ 2614. Employment and benefits protection

(a) Restoration to position.

(1) In general. Except as provided in subsection (b), any eligible employee who takes leave under section 102 [29 USCS § 2612] for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits. The taking of leave under section 102 [29 USCS § 2612] shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations. Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the

health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction. Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 102 [29 USCS § 2612] to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees.

(1) Denial of restoration. An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees. An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits.

(1) Coverage. Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 102 [29 USCS § 2612], the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986 [26 USCS

§ 5000(b)(1)]) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave. The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 102 [29 USCS § 2612] if--

(A) the employee fails to return from leave under section 102 [29 USCS § 2612] after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than--

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 102(a)(1) [29 USCS § 2612(a)(1)]; or

(ii) other circumstances beyond the control of the employee.

(3) Certification.

(A) Issuance. An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by--

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(C) [29 USCS § 2612(a)(1)(C)]; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)].

(B) Copy. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification.

(i) Leave due to serious health condition of employee. The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member. The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

HISTORY: (Feb. 5, 1993, P.L. 103-3, Title I, § 104, 107 Stat. 12.)

29 USCS § 2615 (2004)

§ 2615. Prohibited acts

(a) Interference with rights.

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS §§ 2611 et seq.].

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [29 USCS §§ 2611 et seq.].

(b) Interference with proceedings or inquiries. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title [29 USCS §§ 2611 et seq.];

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title [29 USCS §§ 2611 et seq.]; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title [29 USCS §§ 2611 et seq.].

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title I, § 105, 107 Stat. 14.)

29 USCS § 2616 (2004)

§ 2616. Investigative authority

(a) In general. To ensure compliance with the provisions of this title [29 USCS §§ 2611 et seq.], or any regulation or order issued under this title [29 USCS §§ 2611 et seq.], the Secretary shall have, subject to subsection (c), the investigative authority provided under section 11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)).

(b) Obligation to keep and preserve records. Any employer shall make, keep, and preserve records pertaining to compliance with this title [29 USCS §§ 2611 et seq.] in accordance with section 11(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) and in accordance with regulations issued by the Secretary.

(c) Required submissions generally limited to an annual basis. The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during

any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this title [29 USCS §§ 2611 et seq.] or any regulation or order issued pursuant to this title [29 USCS §§ 2611 et seq.], or is investigating a charge pursuant to section 107(b) [29 USCS § 2617(b)].

(d) Subpoena powers. For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

HISTORY:

(Feb. 5, 1993, P.L. 103-3, Title I, § 105, 107 Stat. 15.)

29 USCS § 2617 (2004)

§ 2617. Enforcement

(a) Civil action by employees.

(1) Liability. Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 [29 USCS § 2615] proves to the satisfaction of the court that the act or omission which violated section 105 [29 USCS § 2615] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105 [29 USCS § 2615], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action. An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of--

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs. The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations. The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate--

(A) on the filing of a complaint by the Secretary in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in

paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1), unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by the Secretary.

(1) Administrative action. The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 105 in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

(2) Civil action. The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A).

(3) Sums recovered. Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation.

(1) In general. Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation. In the case of such action brought for a willful violation of section 105 [29 USCS § 2615], such action may be brought within 3 years of the date of the last

event constituting the alleged violation for which such action is brought.

(3) Commencement. In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary. The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary--

(1) to restrain violations of section 105 [29 USCS § 2615], including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor. The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) General Accounting Office and Library of Congress. In the case of the General Accounting Office and the Library of Congress, the authority of the Secretary of Labor under this title [29 USCS §§ 2611 et seq.] shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

HISTORY:

(Feb. 5, 1993, P.L. 103-3, Title I, § 107, 107 Stat. 15; Jan. 23, 1995, P.L. 104-1, Title II, Part A, § 202(c)(1)(B), 109 Stat. 9.)

29 USCS § 2618 (2004)

§ 2618. Special rules concerning employees of local educational agencies

(a) Application.

(1) In general. Except as otherwise provided in this section, the rights (including the rights under section 104 [29 USCS § 2614], which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this title [29 USCS §§ 2611 et seq.] shall apply to--

(A) any "local educational agency" (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 USCS § 7801] and an eligible employee of the agency; and

(B) any private elementary or secondary school and an eligible employee of the school.

(2) Definitions. For purposes of the application described in paragraph (1):

(A) Eligible employee. The term "eligible employee" means an eligible employee of an agency or school described in paragraph (1).

(B) Employer. The term "employer" means an agency or school described in paragraph (1).

(b) Leave does not violate certain other Federal laws. A local educational agency and a private elementary or secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this title [29 USCS §§ 2611 et seq.].

(c) Intermittent leave or leave on a reduced schedule for instructional employees.

(1) In general. Subject to paragraph (2), in any case in which an eligible employee employed principally in an instructional capacity by any such educational agency or school requests leave under subparagraph (C) or (D) of section 102(a)(1) [29 USCS § 2612(a)(1)(C) or (D)] that is foreseeable based on planned medical treatment and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either--

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that--

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) Application. The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an eligible employee who complies with section 102(e)(2) [29 USCS § 2612(e)(2)].

(d) Rules applicable to periods near the conclusion of an academic term. The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any eligible employee employed principally in an instructional capacity by any such educational agency or school:

(1) Leave more than 5 weeks prior to end of term. If the eligible employee begins leave under section 102 [29 USCS § 2612] more than 5 weeks prior to the end of the academic

term, the agency or school may require the employee to continue taking leave until the end of such term, if--

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) Leave less than 5 weeks prior to end of term. If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 102(a)(1) [29 USCS § 2612(a)(1)(A), (B), or (C)] during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if--

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) Leave less than 3 weeks prior to end of term. If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 102(a)(1) [29 USCS § 2612(a)(1)(A), (B), or (C)] during the period that commences 3 weeks prior to the end of the academic term and the duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) Restoration to equivalent employment position. For purposes of determinations under section 104(a)(1)(B) [29 USCS § 2614(a)(1)(B)] (relating to the restoration of an eligible employee to an equivalent position), in the case of a local educational agency or a private elementary or secondary school, such determination shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements.

(f) Reduction of the amount of liability. If a local educational agency or a private elementary or secondary school that has

violated this title [29 USCS §§ 2611 et seq.] proves to the satisfaction of the court that the agency, school, or department had reasonable grounds for believing that the underlying act or omission was not a violation of this title [29 USCS §§ 2611 et seq.], such court may, in the discretion of the court, reduce the amount of the liability provided for under section 107(a)(1)(A) [29 USCS § 2617(a)(1)(A)] to the amount and interest determined under clauses (i) and (ii), respectively, of such section.

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title I, § 108, 107 Stat. 17; Oct. 20, 1994, P.L. 103-382, Title III, Part I, § 394(e), 108 Stat. 4027.) (As amended Jan. 8, 2002, P.L. 107-110, Title X, Part G, § 1076(v), 115 Stat. 2093.)

29 USCS § 2619 (2004)

§ 2619. Notice

(a) In general. Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title [29 USCS §§ 2611 et seq.] and information pertaining to the filing of a charge.

(b) Penalty. Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $ 100 for each separate offense.

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title I, § 109, 107 Stat. 19.)

TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE COMMISSION ON LEAVE

29 USCS § 2631 (2004)

§ 2631. Establishment

There is established a commission to be known as the Commission on Leave (referred to in this title [29 USCS §§ 2631 et seq.] as the "Commission").

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title III, § 301, 107 Stat. 23.)

29 USCS § 2632 (2004)

§ 2632. Duties

The Commission shall--

(1) conduct a comprehensive study of--

(A) existing and proposed mandatory and voluntary policies relating to family and temporary medical leave, including policies provided by employers not covered under this Act;

(B) the potential costs, benefits, and impact on productivity, job creation and business growth of such policies on employers and employees;

(C) possible differences in costs, benefits, and impact on productivity, job creation and business growth of such policies on employers based on business type and size;

(D) the impact of family and medical leave policies on the availability of employee benefits provided by employers, including employers not covered under this Act;

(E) alternate and equivalent State enforcement of title I with respect to employees described in section 108(a) [29 USCS § 2618(a)];

(F) methods used by employers to reduce administrative costs of implementing family and medical leave policies;

(G) the ability of the employers to recover, under section 104(c)(2) [29 USCS § 2614(c)(2)], the premiums described in such section; and

(H) the impact on employers and employees of policies that provide temporary wage replacement during periods of family and medical leave.

(2) not later than 2 years after the date on which the Commission first meets, prepare and submit, to the appropriate Committees of Congress, a report concerning the subjects listed in paragraph (1).

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title III, § 302, 107 Stat. 23.)

29 USCS § 2633 (2004)

§ 2633. Membership

(a) Composition.

(1) Appointments. The Commission shall be composed of 12 voting members and 4 ex officio members to be appointed not later than 60 days after the date of the enactment of this Act [enacted Feb. 5, 1993] as follows:

(A) Senators. One Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate.

(B) Members of House of Representatives. One Member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one

Member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives.

(C) Additional members.

(i) Appointment. Two members each shall be appointed by--

(I) the Speaker of the House of Representatives;

(II) the Majority Leader of the Senate;

(III) the Minority Leader of the House of Representatives; and

(IV) the Minority Leader of the Senate.

(ii) Expertise. Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor management issues. Such members shall include representatives of employers, including employers from large businesses and from small businesses.

(2) Ex officio members. The Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Commerce, and the Administrator of the Small Business Administration shall serve on the Commission as nonvoting ex officio members.

(b) Vacancies. Any vacancy on the Commission shall be filled in the manner in which the original appointment was made. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(c) Chairperson and vice chairperson. The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) Quorum. Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

HISTORY: (Feb. 5, 1993, P.L. 103-3, Title III, § 303, 107 Stat. 24.)

29 USCS § 2634 (2004)

§ 2634. Compensation

(a) Pay. Members of the Commission shall serve without compensation.

(b) Travel expenses. Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of title 5, United States Code, when performing duties of the Commission.

HISTORY: (Feb. 5, 1993, P.L. 103-3, Title III, § 304, 107 Stat. 25.)

29 USCS § 2635 (2004)

§ 2635. Powers

(a) Meetings. The Commission shall first meet not later than 30 days after the date on which all members are appointed, and the Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) Hearings and sessions. The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(c) Access to information. The Commission may secure directly from any Federal agency information necessary to

enable it to carry out this title, if the information may be disclosed under section 552 of title 5, United States Code. Subject to the previous sentence, on the request of the chairperson or vice chairperson of the Commission, the head of such agency shall furnish such information to the Commission.

(d) Use of facilities and services. Upon the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of such agency.

(e) Personnel from other agencies. On the request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to serve as an Executive Director of the Commission or assist the Commission in carrying out the duties of the Commission. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(f) Voluntary service. Notwithstanding section 1342 of title 31, United States Code, the chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title III, § 305, 107 Stat. 25.)

29 USCS § 2636 (2004)

§ 2636. Termination

The Commission shall terminate 30 days after the date of the submission of the report of the Commission to Congress.

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title III, § 306, 107 Stat. 25.)

TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE MISCELLANEOUS PROVISIONS

29 USCS § 2651 (2004)

§ 2651. Effect on other laws

(a) Federal and State antidiscrimination laws. Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) State and local laws. Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title IV, § 401, 107 Stat. 26.)

29 USCS § 2652 (2004)

§ 2652. Effect on existing employment benefits

(a) More protective. Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less protective. The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title IV, § 402, 107 Stat. 26.)

29 USCS § 2653 (2004)

§ 2653. Encouragement of more generous leave policies

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title IV, § 403, 107 Stat. 26.)

29 USCS § 2654 (2004)

§ 2654. Regulations

The Secretary of Labor shall prescribe such regulations as are necessary to carry out title I and this title [29 USCS §§ 2611 et seq., 2651 et seq.] not later than 120 days after the date of the enactment of this Act [Feb. 5, 1993]

HISTORY:
(Feb. 5, 1993, P.L. 103-3, Title IV, § 404, 107 Stat. 26.)

APPENDIX F

IN THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

Case No. 99-02649
Chapter 11
Judge Paine
Jointly Administered

[Filed June 14, 2004]

In re:	)
	)
SERVICE MERCHANDISE COMPANY, INC., et al.,	)
	)
Debtors.	)
	)

ORDER MODIFYING THE CONFIRMATION ORDER WITH RESPECT TO CLAIM NUMBER 3721 FILED BY GREGORY J. COVUCCI

Upon the Objection of the Reorganized Debtors to Claim Number 3721 filed by Gregory J. Covucci (the "Objection"); and Gregory J. Covucci's Response thereto (the "Response"); and the pretrial conference held on May 17, 2004; and Gregory J. Covucci appearing pro se; and Paul G. Jennings and Phillip G. Young appearing on behalf of the Reorganized

Debtors; and upon the entire record herein; and good and sufficient cause appearing thereof,

IT IS HEREBY FOUND:

A. Prior to the filing of these bankruptcy cases, Gregory J. Covucci (the "Claimant") filed two separate lawsuits (the "Lawsuits") against the Reorganized Debtors, the facts of which give rise to Claim Number 3721 (the "Claim").

B. One of the Lawsuits was filed on November 22, 1996 in the District Court for the Northern District of Ohio, and was designated Civil Action 3:96 CV 7720.

C. The District Court dismissed the lawsuit and that dismissal was affirmed by the Sixth Circuit Court of Appeals (Case No. 97-4472).

D. These bankruptcy cases were filed prior to the deadline for filing a petition for certiorari with the United States Supreme Court regarding the action originally filed in the Northern District of Ohio.

E. The second of the Lawsuits was filed in the Court of Common Pleas for Lucas County, Ohio and was later removed to the United States District Court for the Northern District of Ohio.

F. This second action was pending before the Sixth Circuit Court of Appeals under case number 98-3823 when these bankruptcy cases were initiated.

G. The Reorganized Debtors and the Claimant agree that the Findings of Fact, Conclusions of Law, and Order Under 11 U.S.C. §§ 1129(a) and (b) and Fed. R. Bankr. P. 3020

Confirming the First Amended Joint Plan of Service Merchandise Company, Inc. and its Affiliate Debtors, as Modified (Docket No. 8639) (the "Confirmation Order") should be modified so as to allow the Claimant to proceed with his appeals in the Lawsuits.

H. It is in the best interest of the Reorganized Debtors' estate to modify the Confirmation Order to allow the appeals in the Lawsuits to continue, thereby reducing the expense of retrying issues related to the Lawsuits.

I. It is in the best interest of judicial efficiency to modify the Confirmation Order to allow the appeals in the Lawsuits to continue.

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED:

1. The Confirmation Order shall be modified to allow the Claimant to exhaust his appeals relative to the two cases pending against the Reorganized Debtors in the Sixth Circuit Court of Appeals: Case No. 97-4472 and Case No. 98-3823.

2. Nothing in this Order shall grant the Claimant any right to initiate any new suit against the Reorganized Debtors.

3. Claimant shall have no other cause of action, whether before this Court or any other court, with regard to the allegations contained in the Lawsuits or in the Claim.

4. Within ten days of entry of this Order, the Claimant shall notify the Sixth Circuit Court of Appeals that this Court has modified the Confirmation Order so as to allow the appeals in the Lawsuit to continue. Failure to do so shall result in this Court's denial of the Claim without further

adjudication.

5. Upon the conclusion of the appeals process in the Lawsuits, this Court shall liquidate the Claim consistent with the rulings of the courts that adjudicate the Lawsuits.

ENTER this _____ day of _____, 2004.

/s/_____
Judge George C. Paine II
United States Bankruptcy Judge

APPROVED FOR ENTRY:
/s/_____

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APPENDIX G

TITLE 11. BANKRUPTCY
CHAPTER 1. GENERAL PROVISIONS

11 USCS § 108 (2004)

§ 108. Extension of time

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the

case; or

(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

HISTORY:

(Nov. 6, 1978, P.L. 95-598, Title I, § 101, 92 Stat. 2556; July 10, 1984, P.L. 98-353, Title III, Subtitle H, § 424, 98 Stat. 369; Oct. 27, 1986, P.L. 99-554, Title II, Subtitle B, § 257(b), 100 Stat. 3114.)